

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-866

MARSHALL DESHUN CURRY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 11, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION
[NO. CR2007-2884]

HONORABLE WILLARD
PROCTOR, JR., JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Marshall Deshun Curry was found guilty by a Pulaski County Circuit Court jury of two counts of rape and was sentenced to a total of twenty-five years' imprisonment in the Arkansas Department of Correction. On appeal, he argues that the trial court abused its discretion in admitting evidence of a prior bad act pursuant to the pedophile exception. We affirm.

In September 2006, Curry, who was then seventeen years old, moved into the home of Erica Austin. Austin had five children, one was Curry's half brother. Austin invited Curry to live with her after she learned that Curry had no where to live. At some point after Curry moved in, Austin learned that Curry was sexually abusing A.C., her eleven-year-old daughter. Austin removed Curry from her home and reported the incident to the police. Curry was thereafter charged by felony information with two counts of raping A.C.

One day before trial, Curry's counsel moved to exclude excerpts from a statement that Curry gave to police, wherein he admitted raping A.C. but also discussed holding down a little girl in a garage when he was twelve. Curry's counsel contended that the incident in the garage was evidence of a prior bad act and was inadmissible pursuant to Arkansas Rule of Evidence 404(b). The State argued that the evidence was admissible under the pedophile exception to Rule 404(b). The trial court denied Curry's motion.

At trial, Austin testified that she learned from her eight-year-old son, B.M., that Curry and A.C. were doing something that they were not supposed to do. When Austin asked A.C. what she and Curry had been doing, A.C. responded that Curry "had been sticking his penis in [my] butt." Austin confronted Curry with the accusation, and he denied it. Austin believed Curry because she thought of him as one of her own children. A few days later A.C. told Austin that "I was in my room sleeping, and [Curry] walked into my room with his ding-a-ling in his hand and up to my mouth asking me to suck it, and he promised this would be the last time." Austin testified that Curry later told her that "what [A.C.] said between me and her is the truth."

A.C. testified that Curry touched her breasts and her butt with his hands and penis. She said that Curry's penis "went inside my butt" and in her mouth. She said that it happened often and that on one occasion, B.M. walked in the room when Curry was about to sexually abuse her. B.M. testified that once he witnessed Curry drag A.C. upstairs with his hand on her mouth, and then he saw them in the bedroom. A.C. was under the covers of the bed, and Curry was partially undressed.

Little Rock Police Detective Rob Bell testified that he took a statement from Curry, which was audio taped. In that statement, Curry admitted he “messed” with A.C. He stated that he penetrated her mouth with his penis approximately ten or twelve times. He further stated that once B.M. walked in on him and A.C. He said “I thought I would probably never get caught” and “I must have thought it was a favor.” In his statement, Curry also said “it happened before,” immediately followed by his affirmation that when he was twelve, he held a little girl down in a garage. The entire statement was played for the jury at trial.

On appeal, Curry does not challenge the sufficiency of the evidence supporting the two rape convictions. His sole argument is an evidentiary one. It is well established that the admission or rejection of evidence under Arkansas Rule of Evidence 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Strong v. State*, 372 Ark. 404, ___ S.W.3d ____ (2008).

Curry argues that the trial court abused its discretion when it permitted the State to offer into evidence the portions of his statement wherein he mentioned the garage incident. He insists that the evidence is nothing more than a prior bad act and that the pedophile exception does not apply because the prior incident and the present allegations are dissimilar. We agree.

According to Arkansas Rule of Evidence 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” However, such evidence is permissible for various other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Ark. R. Evid. 404(b). We have approved allowing evidence

of similar acts with the same or other children in the household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005). This is known as the “pedophile exception” to Rule 404(b). *Anderson, supra*. Further, it is admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim. *Id.* The rationale for recognizing this exception is that such evidence helps to prove the depraved sexual instinct of the accused. *Id.* For the pedophile exception to apply, a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant is required. *Strong, supra*.

Curry argues that there is a lack of similarity between his prior bad act and the sexual misconduct in the instant case. In his statement, Curry only affirms that “he held that little girl down” “in the garage.” Absent from the statement is information that he sexually assaulted the girl, the age of the girl, and her relation to Curry. The State responds that at the hearing on Curry’s motion to exclude the evidence, more details about the prior incident were provided to the trial court that established the pedophile exception.¹ Referencing a purported written confession Curry made as a juvenile following the garage incident, the State advised the trial court that Curry was charged with rape of an eight-year-old girl but that he pled guilty to sexual assault. The State also advised that the victim was a friend or neighbor of

¹The State also argues that Curry failed to object when the State provided the details about the prior incident. This argument lacks merit as it is well settled that arguments of counsel to the trial court are not evidence. *Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999). Because the State’s arguments at the motion in limine hearing were not evidence, there was nothing to which Curry could have objected.

Curry's family. Lastly, the State advised that Curry confessed to inserting his penis in the eight-year-old victim's mouth. Based on this additional information, consisting entirely of arguments of counsel, the trial court held that there were significant similarities between the two incidents—specifically, the age of the victims and the nature of the sexual abuse. We hold that the trial court abused its discretion when it admitted into evidence the excerpts from Curry's statement mentioning the prior incident.

The pedophile exception requires that there be a similarity between the “evidence to be introduced” and the sexual conduct at issue, as well as evidence of an intimate relationship between the defendant and the prior victim. *Strong*, 372 Ark. at ____, __ S.W.3d at _____. In the present case, the “evidence to be introduced” consisted solely of Curry's statement—his affirmation that “he held that little girl down” when he was twelve. There is no possible way to infer from this limited evidence any similarity with the act at issue or the nature of the relationship between the prior victim and Curry.

What the State is proposing is that the trial court be permitted to consider information beyond the “evidence to be introduced” (Curry's statement) in making a pedophile-exception determination. However, the State cites no authority in support of its proposition. Moreover, none of the details provided by the State beyond Curry's statement were introduced as evidence. As such, the jury did not hear any of the extra information upon which the trial court relied to satisfy the pedophile exception. All the jury heard was that when Curry was twelve he held down a little girl in a garage. This evidence clearly fails to meet the requirements of the pedophile exception, and because it is nothing more than evidence of a

prior bad act, it should have been excluded under Rule 404(b). Therefore, we hold that the trial court abused its discretion in admitting this evidence.

Our holding on the evidentiary matter does not, however, require the reversal of this case because the trial court's error was harmless. When a trial court errs in admitting evidence, the appellate court will affirm the conviction and deem the error harmless if the evidence of guilt is overwhelming and the error is slight. *Marmolejo v. State*, 102 Ark. App. 264, ___ S.W.3d ____ (2008). To determine if the error is slight, we look to see if the defendant was prejudiced. *Id.*

Pursuant to Arkansas Code Annotated section 5-14-103(a)(3)(A) (Repl. 2006), a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. In rape cases, we have held that a victim's uncorroborated testimony is sufficient to support a conviction if the statutory elements of the offense are satisfied. *Strong, supra.*

In this case, there was overwhelming evidence that Curry raped A.C. Not only did A.C., the victim, testify that Curry raped her, but Curry unequivocally confessed to police that he raped A.C. ten to twelve times. Also Curry stated to Austin that A.C.'s version of events "[was] the truth." These facts demonstrate that there was overwhelming evidence of guilt and that Curry suffered no prejudice when the garage-incident evidence was presented to the jury. Accordingly, we hold that the trial court's error in admitting Curry's prior bad act under the pedophile exception was harmless.

Affirmed.

GLADWIN and KINARD, JJ., agree.